(1)

95-1613

Supreme Court, U.S.
FILED
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CLERK

No.

In The

Supreme Court of the United States

LUTHER C. PERKINS
Petitioner

vs.

JESSE BROWN, SECRETARY,
U.S. DEPARTMENT OF VETERANS AFFAIRS
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED FOR REVIEW

1. The Central question presented before this Court is should the "sins of the lawyer be visited upon the Client "so that the Client is denied his right to a trial by Jury of his Peers according to the Bill of Rights? Amendment VII

2. Is an archaic precedent (the client is responsible for the actions and omissions of an attorney) more important than the client having to accept a cruel and unusual punishment (case being thrown out of court) for an Attorney's Dastardly act in strict violation of the Bill of Rights? Amendment VIII.

3. Why doesn't the Court make a ruling, "When an Attorney's Gross Negligence or Incompetence deprives the Client of the right to a trial by his peers, the Statute of Limitations is automatically waived?

4. How is Justice served in an AGE DISCRIMINATION CASE by a separate Civil Action against the Plaintiff's Counsel for mal-practice?

5. What is the criteria by which a Justice of a Civil Court determines whether a case is "frivolous" without any facts or documents being presented?

6. What is the criteria that determines that a Client must accept the low standards and morals of the Plaintiff's Counsel as his own?

7. How does a Civil Court Justice determine the PARAMETERS of the "more narrow view of the doctrine recently articulated by the Supreme Court?"

8. Is COMMON SENSE (Good Judgment) no longer a factor in rulings and decisions by the Courts?

9. How is a citizen of the UNITED STATES to enter the "argumentative system" when barred from the Halls of Justice by actions and omissions of Counsel and condoned by the Court.

10. Is lying, stealing, and falsifying documents by an Attorney accepted procedure by the Courts at the Expense of Justice?

11. Which is correct the Right to a Trial by Jury shall be preserved (Amendment VII) or Denying him his day in Court According to the U.S. Attorney and affirmed by the U.S. Court of Appeals for the First Circuit and condoned by the U.S. District Court of New Hampshire?

12. Why is there not a rule by the Judiciary that NO Case shall be thrown out of court without due notice to the client?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the title of the case

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TABLE OF AUTHORITIES

A. COMMON SENSE

Definition according to Funk and Wagnalls Standard Desk Dictionary.
practical understanding; sound judgment"

B. CONSTITUTION OF THE UNITED STATES
(AMENDMENT VII and AMENDMENT VIII)

C. STATUTES
Age Discrimination in Employment act, as amended, 29 U.S.C. 626.D. CASES

Carter v City of Memphis, Tennessee cite as 636 F.2d 159 (1980) Docket No. 79-1056

Damian v Rhode Island Hosp. cite as 636 F. 2d 159 (1983)

Edsall v Penn Central Transp. Co. 479 F2d 385 *SIXTH CIRCUIT* (1973) (Per curium 586 F 2d 385

Edwards Const. Co. v Anderson Safeway, etc. cite as 542 F. 2d 1318 (1976) SEVENTH *CIRCUIT.*

Hasenflu v Pyke FIFTH CIRCUIT 1974 491 F. 2d 1094

Link v Wabash R. Co. , U.S. 626 p 1392,1395, 1396, 1397, 1398 , and 1399

Silas v Sears , *Roebuck & Co., Inc.No 78-2019 cite as* 586 F.2d 382, 385 *FIFTH CIRCUIT (1978)*

Volk v Multi media, inc. cite as 516 F.. Supp 157 (1981) U.S. District Court S.D. Ohio No. C-1-79-1386

E. RULES

Federal service rule of Civil procedure (4) provides that the Court may extend the time for filing providing the Plaintiff shows good cause for the delay.

OPINIONS BELOW

Decision by the United States Court of Appeals for the First Circuit. No. 95-1645 (Appendix A).
December 5, 1995

An order by the United States Court for the District of N .H Civil No. 94-347 JD (Appendix B)
May 25, 1995

JURISDICTION

UNITED STATES CONSTITUTION, BILL OF RIGHTS (AMENDMENT VII)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

UNITED STATES CONSTITUTION, BILL OF RIGHTS (AMENDMENT VIII)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

SUPREME COURT RULE #10

(a) The United States Court of Appeals for the FIRST CIRCUIT has entered a decision in conflict with the decision of another United States Court on the SAME matter. (United States Courts of appeal for the FIFTH, SIXTH AND SEVENTH CIRCUITS).

(b) A United States Court of Appeals has decided an important question of Federal Law that has not been , but should be (clearly delineated) settled by this court.

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act of l967, as amended 29 U.S.C. 626 (e) provides: Section 259 of this title shall apply to actions under this chapter. If a charge filed with the commission under this act is dismissed or the proceeding of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A Civil action may be brought under this section by a person defined in section 630 (a) against the respondent named in the charge within 90 days after the date of the receipt of such notice. Amendment #2 consists of "Prior to its amendment in l991, 626 (e)(l) provided that the two and three year statute of Limitations codified at 29 U.S.C. applied to ADEA actions.

STATEMENT OF THE CASE

This case started as an age discrimination case, but has evolved into whether or not the Statute of Limitations should be waived (tolled) due to Counsels GROSS NEGLIGENCE (Stealing, Lying, Falsifying of an Invoice) to mislead the client into believing a complaint had been filed in a timely manner as requested by the client. (Appendices (C,D, and E)

The Equal Employment Opportunity Commission decision received by the Petitioner, included the assertion that the Petitioner, had the right to file a Civil Action in the appropriate United States District Court. Said assertion was ambiguous as to whether the Petition had ninety(90) days or thirty (30) days to file the action in the Appropriate United States District Court, however, the Petitioner specifically requested Counsel to file within the thirty (30) days to make sure the complaint was filed in a timely manner. Counsel did NOT DO THIS. When the Petitioner sought Status of the Complaint, the Petitioner was informed by the Clerk in the U.S. District Court that no complaint had been filed.

The Petitioner received the final decision from EEOC on September 23, 1993, composed the complaint and demand for Jury Trial on September 24, 1993 with the aid of Counsel and Assurance from Counsel the complaint would be filed in the U.S. District Court in a timely manner. (Appendix C).

As per invoice document from Marshall Law Inc., of East Kingston, N.H. with fraudulent information.:

10-7-93 Initial Conference with Client
10-14-93 Draft Complaint
10-19-93 Fax Use Charge
10-22-93 Postage

This led Petitioner to believe the complaint had been filed in a timely manner. After numerous tries to contact the lawyer (falsely believing it was being handled in a competent manner) waited until returning from Florida before following up the issue.

Petitioner then filed the complaint with the assistance of Ex-counsel's Law Partner, (Appendix D), then received Motion for dismissal from defendant due to Statute of Limitations. Petitioner than filed a counter motion. Motion of Petitioner denied.

Received the decision of the U.S. District Court of the State of N.H. Civil No. F-l-94-357-JD "the court finds that , the failure to file resulted solely from the GROSS ERROR of the PLAINTIFF'S ATTORNEY and his LAW FIRM. "however, even MISCONDUCT of the MAGNITUDE alleged in this case does not warrant equitable tolling under the more "NARROW VIEW " of the doctrine recently articulated by the SUPREME COURT and other courts sitting in this and other circuits." (Appendix B)

The Petitioner firmly believes that the question needs to be answered, what MAGNITUDE is great enough to warrant tolling? What are the PARAMETERS of the NARROW VIEW?

Also how does the District Court determine that a MALPRACTICE suit would resolve the issue in an age discrimination suit? This would only be of help to the Lawyers (financially) involved and in NO way resolve the discrimination issue.

On December 8, 1995 received the decision by the U.S. Court for the First Circuit (Appendix A) , which affirmed the decision by the District Court. "under our system of representative litigation, clients are ORDINARILY held responsible for the acts and omissions of their attorneys." ("[W]hile [t]he argument the sins of the attorney should not be visited upon the client is a seductive one, ...its siren call is overborne by the nature of the adversary system." Although we are not unsympathetic with appellant's plight, we agree that he is left to his remedies against counsel.

At this time the petitioner would ask the question what is ORDINARY? Petitioner must be held responsible for the

ORDINARY actions of an attorney who lied, stole ($125) in escrow for filing fee for his own use and misled the client. If the lawyer had stolen this money at the point of a gun, would the Petitioner still be responsible for the actions of his attorney?

Would the U.S. Attorney , the U.S. District Court and the U.S. Court of Appeals for the first Circuit still be defending this attorney who has had his license suspended to Practice Law in the State of N.H. These same attorneys who are prosecuting daily citizens who lie, steal and defraud? .

The statement " While the argument that the sins of the Attorney should not be visited upon the client is a seductive one, its siren call is overborne by the nature of the adversary system". This is the same argument the FIRST CIRCUIT has used previously (*Damiani v Rhode Island Hosp)* cite as 704 f.2d 12 (1983) and has fancy words but a very unclear message.

The Petitioner's interpretations as a layman: "Reveille, wake up and see the light, this court agrees with you but we must protect the lawyer and reduce congestion in the courts, even at the expense of Justice.

How does a citizen of the United States enter the adversary system of the courts if denied admission by the DASTARDLY ACTS of his ATTORNEY and condoned by the courts?

"Remedies against Counsel" does not put the "facts and "documentation " of a DISCRIMINATION CASE before a Jury of his peers according to the BILL OR RIGHTS (Amendment VII).

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the FIRST CIRCUIT is in COMPLETE DISAGREEMENT with decisions of the FIFTH (5th) CIRCUIT, SIXTH (6th) CIRCUIT and the SEVENTH (7TH) CIRCUIT plus *Volk v. Multi-media, inc.* cite as 516 F. 2d 157 (1981) United States District Court, S.D. Ohio, W.D. (3) and the opinion of MR. JUSTICE BLACK WITH MR. JUSTICE DOUGLAS AND MR. CHIEF JUSTICE WARREN CONCURRING, Link v. Wabash r. Co., U.S. 626 P 1392,1397,1398, and 1399

Decision by the United States Court of Appeals, ***FIFTH CIRCUIT*** *Silas v. Sears Roebuck & Company, Inc. No. 78-2019* cite as 586 F.2d (1978). Furthermore, the record reveals no complicity on the part of the plaintiff in the INACTION OF HIS ATTORNEY which occasioned the dismissal. p.385[7]l. "Dismissal is generally inappropriate and lesser sanctions are favored where neglect is plainly attributable to an ATTORNEY rather than to his BLAMELESS CLIENT. Se, eq,: *Hassenflu v. Pyle,* 5TH CIR., 1974, 491 F 2 d 1094."in the circumstances of this case, we find that the trial court abused its discretion in denying appellant's 6 (b) motion. Immediate imposition of the sanction of dismissal was much too severe a response to the failure of Silas's attorney to appear at the pretrial conference.

WE REMAND THE CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO REINSTATE SILAS'S ACTION ON THE DOCKET

REVERSED AND REMANDED

Decision by the United States Court of Appeals, ***SIXTH CIRCUIT*** *Carter v. City of Memphis, Tennessee* cite as 636 F.2d 159 (1980) Docket No. 79-1056

"The Court of Appeals held that: (l) dismissal for Counsel's failure to comply with pretrial orders is a HARSH sanction which should only be had in extreme situations.

"DISMISSAL WAS ABUSE OF DISCRETION." p.159 "The dismissal of an action for attorney's failure to comply is a HARSH sanction which the court should order only in extreme situations showing "a clear record of delay or contumacious conduct by the plaintiff." *Silas v Sears. Roebuck & Co Inc 586*F 2d 382,385 ***(5TH CIR 1978)*** See *Edsall v. Penn Central Transp. Co* F2d 33 ***(5th CIR 1978)*** (per curiam) . Absent this showing, an order of dismissal is an ABUSE OF DISCRETION: The court is limited to lesser sanctions designed to achieve compliance. 586 F.2d 385 "Not with standing plaintiff's attorney's conduct, in our view the district court abused its discretion in dismissing the complaint. **THE PLAINTIFF IS BLAMELESS!** .

REVERSED AND REMANDED

Decision by the United States Court of Appeals, ***SEVENTH CIRCUIT*** *Edwards Const. Co. v. Anderson Safeway, etc.* cite as 542 F 2d 1318 (1976)."the key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference , failure to prepare for conference, or failure to prepare for conference, or failure to comply with the pre-trial order." ID 1323.**DISMISSAL IS USUALLY INAPPROPRIATE WHERE THE NEGLECT IS SOLELY THE FAULT OF THE ATTORNEY."**

REVERSED AND REMANDED

Decision by the U.S. District Court, S.D. Ohio, W.D. 516 Feb. 19, 1991 p.157 160 Vol v. Multi-Media, Inc. "Where" failure to

file was due to attorney error, scales TIPPED in favor of equitable tolling. " p. 158. "The effect of this holding is that failure to comply with the notice provision does not necessarily deprive a District Court of the power to entertain a claim under the ADEA. The 180 day period is subject to modification, that is tolling for equitable reasons." in relaxing its view of the notice provision of the ADEA, The ***SIXTH CIRCUIT*** put itself in step with ***OTHER CIRCUITS*** which have considered the matter."

"should not be construed to make it a trap for the unwary nor should it require every claimant to retain counsel experienced in the technicalities of age discrimination litigation."

"Plaintiff's Attorney, who effectively stood in Plaintiff's shoes after being retained was the antithesis of diligence. Furthermore, there is NO EXCUSE for the ignorance of the notice requirement. "

"We find ourselves in a situation where a Plaintiff with a plausible claim may not be able to fully litigate that claim because of the SLOPPY, INEPT PRACTICE OF HIS ATTORNEY". The additional equitable consideration we find applicable in this case is whether the errors of Plaintiff's counsel are of the type that should require us to visit the consequences of those errors UPON THE CLIENT."

"While we in no way condone or encourage this type of practice, we do not feel that it should interfere with plaintiff's prosecution of his claim" and the additional factor of attorney error, we find the scales to be tipped in favor of equitable TOLLING IN THIS CASE." "if attorney had proceeded in an intelligent and reasonable manner, then the outcome might have been different. But in this case the attorney's error was the product of ineptness and sloppiness and we do not think his client should have to suffer because of it. "WHERE FAILURE TO FILE WAS DUE TO ATTORNEY ERROR, SCALES TIPPED IN FAVOR OF EQUITABLE TOLLING.

ORDERED ACCORDINGLY

OATH OF ADMISSION TO THE BAR BY LAWYERS

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

- "I do solemnly swear:
- "I will support the Constitution of the United States and the Constitution of the State (where licensed).
- "I will maintain the respect due to courts of justice and judicial officers;
- "I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor in defense except as I believe to be honestly debatable under the law of the land;
- "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by an artifice of false statement or fact of law;
- "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice of false statement of fact or law.
- "I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
- "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or DELAY anyone's cause for LUCRE or malice. So help me God."

This oath taken by all Justices and Lawyers of the judicial system was very eye opening to this lay person and citizen of the United States. This petitioner has been denied entrance into the Halls of Justice by an attorney who sold his rights to the above for $125, lied to his client and falsified an invoice to mislead the client(petitioner)to believe the complaint had been filed in a timely

manner. For the actions of the attorney, the petitioner must accept the blame and suffer the punishment. WHERE IS JUSTICE?

Defendant's statements in the Brief to the U.S. District Court of New Hampshire and the U.S. Court of Appeals for the First Circuit (19-1645) consistently state that the Client has been denied his day in Court and "Harsh" punishment due to Attorney's Incompetence, Gross Negligence and Dereliction of his sworn duty as an Officer of the Court.

Brief of Appellee - Paul M. Gagnon, U.S.Attorney

T. David Plourde, Ast. U.S. Attorney to the U.S. Court of Appeals for the First Circuit

"Admittedly, some courts have equitably tolled filing deadlines in similar circumstances reasoning that a plaintiff should not suffer for the "sloppy inept practice of his attorney. Volk v. Multi-media, inc. 516 F. Supp. 157, 162 (S.D. Ohio 1981). "However, this court has consistently maintained a "narrow view" of equitable tolling exceptions', Mack v Great Atlantic and Pacific Tea Company, In.' 871 F. 2d 179 (1989), and has declined to equitably toll deadlines even when they were missed because of Attorney's negligence and completely unrelated to any conduct on the part of the plaintiff. See Lopez v Citibank, n.a., 808 f.2d 905 *(1ST CIRCUIT 1987)*equitable tolling denied to plaintiff represented by counsel because, despite PLAINTIFFS MENTAL INCAPACITY, his counsel knew or SHOULD HAVE KNOWN, ABOUT THE STATUTE OF LIMITATIONS: Cano v U.S Postal Service, 755 2d 221,111 (1ST CIRCUIT 1985).

"Specifically, the SUPREME COURT stated that the "principles of tolling...do not extend to what is at best a "garden variety" claim of excusable neglect" and should be applied sparingly. Id. at 94; see Wilson v. United States Government 23 F 3d at 559.

WHAT ARE THE PARAMETERS OF "SPARINGLY", "NARROW VIEW", "GARDEN VARIETY" AND "EXCUSABLE NEGLECT"

THE U.S. COURT OF APPEALS OF THE ***FIRST CIRCUIT*** CONSISTENTLY DENIES CITIZENS OF THEIR RIGHTS ACCORDING TO THE BILL OF RIGHTS (AMENDMENT VII AND VIII). "admittedly, dismissal of Plaintiff" s cause of action and DENYING HIM HIS DAY IN COURT, may seem "HARSH".

THIS STATEMENT BY THE U.S. ATTORNEY IS A STRICT VIOLATION OF AMENDMENT VII

"THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED

and AMENDMENT VIII "NOR CRUEL AND UNUSUAL PUNISHMENT INFLICTED"

The U.S. Attorney clearly and irrevocably makes this statement in his belief that the punishment and penalty are "harsh" and in "denying him his day in court".

THEREFORE THIS CASE SHOULD BE UNQUESTIONABLE RETURNED TO THE PROPER COURT FOR PROPER RESOLUTION OF THE ISSUES BY A JURY OF THE PETITIONER'S PEERS ACCORDING TO THE CONSTITUTION OF THE UNITED STATES

According to the reasoning of the U.S. Attorney's office, U.S. District Court of N.H., and the U.S. Court of Appeals for the First Circuit the client is responsible for the acts and omissions of a Licensed Professional:

1. Surgeon's removal of the patients wrong arm or leg?
2. Registered Nurse administering wrong medication?
3. Registered Pharmacist dispensing a fatal dose of Medication.
4. A Certified Public Accountant falsifying accounts
5. ad infinitum.

Professional's are licensed for their expertise and knowledge. Why are Lawyers given preferential treatment? BECAUSE THEY ARE JUDGED BY FELLOW LAWYERS?

Which is the more despicable crime, a thief who steals at the point of a gun or a lawyer who steals money (Escrow Account of $125 or 3 Million entrusted to the lawyers care) for his own personal use and denies the client the right to a Trial by Jury of his Peers, and his constitutional rights?

The client was perfectly capable of putting the complaint into an envelope and mailing to the U.S. District Court or hand carrying to the court as the Plaintiff did when the U.S. District Court received the complaint filed by the plaintiff after Counsel stated he would make sure it was DELIVERED and DID NOT DO SO.

The Plaintiff believes Amendment VII and VIII of the bill of rights protects the citizenry from the dictatorial power of the sovereign government which also includes the judiciary.

The Plaintiff requested the U.S. Court of Appeals for the First District to Rule whether the VII and VIII Amendments of the Bill of Rights were violated and to remand the case back to the U.S. District Court for a decision according to the merits of the case. The U.S. Court of appeals ignored this question. How many citizens of the United States have been denied their right to a Trial by Jury due to the INCOMPETENCE AND GROSS NEGLIGENCE OF AN ATTORNEY IGNORING HIS SWORN DUTY AS AN OFFICER OF THE COURT.

Three or more U.S. Courts of Appeals faced the issue squarely and returned the cases where the Plaintiff's Counsel was GUILTY of INCOMPETENCE and GROSS NEGLIGENCE to the U.S. District Court where a decision would be made on the merits of the case, while the U.S. Court of Appeals for the First Circuit by passed the issue to Clear Congested Dockets, but Justice definitely is not served.

Which is of more importance to the Courts, the protection of a fellow barrister or the protection of the Citizens of the United States. In this case the Petitioner, trying to protect his honesty, integrity, and reputation of forty-three (43) years as a Professional

Pharmacist, which was the reason Congress enacted the AGE IN DISCRIMINATION ACT

Why do not the Courts question what the desperate need of an attorney was that would warrant the need of $125 at the loss of:

a) Fraternal Respect.
b) Potential Loss of License to Practice Law.
c) Moral Values
d) Respect of Family and Mental Stress to same.
e) Loss of Income
f) and Waste of Years of Training.
g) Self Respect
h) Degradation of his profession.

Why was not a deposition requested from this Attorney by the Courts? Why is the filing of a Malpractice Suit (Attorney's only would gain financially) a viable alternative and resolve the issue as to whether or Not the Petitioner was denied a promotion because of AGE DISCRIMINATION?

The Petitioner will now present an argument by a more eminently qualified person in the Judicial field. This is an opinion by MR. JUSTICE BLACK with MR. JUSTICE DOUGLAS and MR. CHIEF JUSTICE WARREN CONCURRING ...*Link v Wabash R. Co. U.S 626 p 1392, 1395,1396,1397, 1398 and 1399.*

A district court does not lack disciplinary authority over an attorney and there is no JUSTIFICATION, MORAL or LEGAL, for its punishment of an innocent litigant for the PERSONAL CONDUCT OF HIS COUNSEL. Because it was neither necessary or proper to VISIT THE SINS OF THE LAWYER UPON HIS CLIENT.

it seems to me to be contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who so far as this record shows was SIMPLY TRUSTING HIS LAWYER TO

TAKE CARE OF HIS CASE as clients generally do. The Court dismisses this whole question of punishing the plaintiff Link (PERKINS) for the alleged fault of his lawyer with the simple generalized statement: "Petitioner voluntarily chose this attorney as representative in the action, and he can not now avoid the consequences of the acts or omissions of this freely selected agent."

"One may readily accept the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. BUT IT STRETCHES THIS GENERALIZED STATEMENT TO FAR TO SAY THAT HE MUST ALWAYS DO THAT. THIS IS A GOOD ILLUSTRATION OF THE DEPLORABLE KIND OF INJUSTICE THAT CAN COME FROM THE ACCEPTANCE OF ANY SUCH MECHANICAL RULE. The plaintiff's cause of action is valuable property, within the generally accepted sense of that word, and, as such, it is ENTITLED TO THE PROTECTIONS OF THE CONSTITUTION. Due process requires that property shall not be taken away without notice and hearings. I do not see how the result here can be Moreover, to say that the SINS or FAULTS or DELINQUENCIES of a lawyer must always be visited upon his client so as to impose tremendous financial (AND MENTAL) penalties upon him, as here, is to ignore the practicalities and realities of the lawyer-client relationship. (Footnote:) I am not quite able to understand the Court's suggestion that keeping this suit alive would be visiting the sins of plaintiff's lawyer upon the defendant. I do not see how it can be regarded as a punishment to compel a person to try his lawsuit on its MERITS BEFORE AN IMPARTIAL JUDICIAL TRIBUNAL established under and operating in accordance with the CONSTITUTION OF THE UNITED STATE'S.

LAWYERS EVERYWHERE ARE GRANTED LICENSES PRESUMABLY BECAUSE OF THEIR SKILL, THEIR INTEGRITY, THEIR LEARNING IN THE LAW AND THEIR DEPENDABILITY

While there may be some clients sophisticated enough in the affairs of the world to be able to select the good from the BAD among this mass of lawyers throughout the country, this unfortunately cannot always be the case. The average individual called upon, perhaps for the first time in his life , to select a lawyer to try a lawsuit may happen to choose one of the WORST."

"He has a right to rely at least to some extent upon the fact that A LAWYER HAS A LICENSE. From this he is also entitled to believe that the lawyer has the ABILITY TO LOOK OUT FOR HIS CASE and that he should leave the lawyer free from constraint in doing so. Surely it cannot be said that there was a duty resting upon Link (PERKINS) , a layman plaintiff to try to supervise the daily professional services of the lawyer he had chosen to represent him. How could he know, even assuming that it is true, that his lawyer was a careless man or that he would have an adverse effect upon the trial judge by failing (TO FILE A COMPLAINT AS REQUIRED) to appear when ordered? How could he know or why should he be presumed to know that the many steps a lawyer needs to taken to bring his case to trial had been taken by his lawyer? Why should a client be awakened to his lawyers' incapacity for the first time by a sudden brutal pronouncement of the court YOUR LAWYER HAS FAILED TO PERFORM HIS DUTY IN PROSECUTION OF YOUR CASE AND WE ARE THEREFORE THROWING YOU OUT ON YOUR HEELS? So far as this record shows, the plaintiff never received one iota of information, character or type that should have put him on notice as an ordinary layman that his lawyer was not doing his duty. "Any general rule that clients must ALWAYS SUFFER FOR THE MISTAKES OF THEIR LAWYERS SIMPLY IGNORES ALL THESE PROBLEMS. If a general rule is to be adopted, I think it would be far better in the interest of the ADMINISTRATION OF JUSTICE, and far more realistic in the light of what the relationship between a lawyer and his client actually is to ADOPT THE RULE THAT NO CLIENT IS EVER TO BE PENALIZED, AS THIS CLIENT (PERKINS),

because of the CONDUCT of his LAWYER UNLESS NOTICE IS GIVEN TO THE CLIENT HIMSELF that such a threat hangs over his head. SUCH A RULE WOULD DO NOTHING MORE THAN INCORPORATE BASIC CONSTITUTIONAL REQUIREMENT OF FAIRNESS INTO THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY.

When we allow the desire to REDUCE COURT CONGESTION to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of Justice, WHICH IS INDISPENSABLE TO ANY COURT SYSTEM WORTHY OF ITS NAME. Moreover, it seems plain to me that any attempt to cut down on COURT CONGESTION BY DISMISSING MERITORIOUS LAWSUITS IS DOOMED TO FAIL even in its misguided purpose of promoting speed in Judicial Administration. It is true that by its ruling today the Court finally puts an end to this case and thus clears it from all Federal dockets. But in view of the fact that the MERITS OF THE CASE have never been reached, I cannot believe that there should be to much REJOICING at this fact .The end result of the procedures adopted here has been that much time has been wasted and yet NO JUSTICE HAS BEEN DONE. I FIND IT HIGHLY REGRETTABLE THAT THE COURT feels compelled to place its stamp of approval upon such procedures. It may not be of much importance to anyone other than the plaintiff (PERKINS) here and his family whether this case is tried on its merits or not. To my mind, however, it is of VERY GREAT IMPORTANCE TO EVERY ONE IN THIS COUNTRY THAT WE DO NOT ESTABLISH THE PRACTICE OF THROWING LITIGANTS OUT OF COURT WITHOUT NOTICE TO THEM SOLELY BECAUSE THEY ARE CREDULOUS ENOUGH TO ENTRUST THEIR CASES TO LAWYERS WHOSE NAMES ARE ACCREDITED AS WORTHY AND CAPABLE BY THEIR GOVERNMENT.

I FEAR THAT THIS CASE IS NOT LIKELY TO STAND OUT IN THE FUTURE AS THE BEST EXAMPLE OF AMERICAN JUSTICE

This is the opinion of a CHIEF JUSTICE AND TWO (2) ASSOCIATE JUSTICES OF THE SUPREME COURT WHICH IS SIMPLY STATED IN CLEAR, CONCISE and SIMPLE LANGUAGE , which is the same language used by the Circuit Courts which remanded the cases back to the District Courts to be tried on the Merits of the case. Compare these Statements with the Statement of the U.S. Court of Appeals of the FIRST CIRCUIT about the "Siren Call is overborne by the nature of the adversary system." Ridiculous!!!

A confidence man engages in "Double Talk" and "Gibberish" where as the true Professional speaks in Clear, Concise and Simple terms so that the lay person is clearly aware of the meaning which the professional wishes to convey.

TO SUMMARIZE THE ABOVE:

The Supreme Court should subpoena the Petitioners Ex-Counsel for a deposition as to why the funds left in ESCROW for the filing fee were not used for this purpose as requested by the Petitioner.

Request that all records from the District Court and the Court of appeals be forward to this court for review.

That the U.S. Attorney be requested to state the difference between "HARSH" , and CRUEL and 'UNUSUAL PUNISHMENT".

An explanation by the U.S. Attorney and the U.S. Judicial System what is the difference between "DENYING HIM HIS DAY IN COURT" and "THE RIGHT TO TRIAL BY JURY SHALL BE PRESERVED."

The decision by the U.S. Court of Appeals for the **FIRSTS CIRCUIT** is VAGUE and UNCLEAR, whereas the decision for the **FIFTH CIRCUIT, SIXTH CIRCUIT, SEVENTH CIRCUIT,** U.S. District Court, S.D. Ohio, and the opinion of **MR. JUSTICE DOUGLAS, MR. JUSTICE BLACK AND MR. CHIEF JUST WARREN** are very clear and concise.

1. Counsel's partner in the law firm of Marshall Law states, if the complaint was not filed, the Plaintiff should not be held accountable for the negligence of his counsel at the time.

2 5ths Circuit of Appeals states: "The Plaintiff is blameless.

3. 6th Circuit of Appeals states: "Where failure to file was due to Attorney error, scales tipped in favor of equitable tolling." "So ordered.'

4. 7th Circuit of Appeals states. "Dismissal is usually inappropriate where the neglect is solely the fault of the Attorney."

5 a) 6th Circuit of Appeals states: "The 6th Circuit put itself in step with OTHER CIRCUITS which have considered the matter.

b) lst Circuit and the U.S. District Court of N.H.. concurring in the more narrow view of the doctrine recently articulated by the Supreme Courts and other Courts sitting in this and OTHER CIRCUITS..

c) Which statement is correct? The one that is for Justice or the one for the protection of the members of the Judiciary System.

6. The statements by the former Chief of Staff at the Veterans Administration Center, Castle Point, New York proves this is definitely NOT a "frivolous" or "Garden Type" case as stated by the U.S. District Court of N.H. and affirmed by the lst court of Appeals. (Appendix J).

This decision and it is just that a decision by the U.S. Court of Appeals of the First Circuit brought down an Iron Curtain blocking this Petitioner's right to Justice.

Let the Decision by the Supreme Court settle this question once and for all and raise the Iron Curtain and let the Rays of Justice shine forth in the Halls of Justice.

JUSTICE IS NOT BEING SERVED ACCORDING TO THE CONSTITUTION AND THE BILL OF RIGHTS. Amendment VII and Amendment VII.

CONCLUSION

Let this Court set a precedent and make a decision and statement that the "Sins , Faults or delinquencies of a lawyer shall NOT be visited upon the client.".

That a Citizens claim can not be thrown out of Court unless the Citizen Personally is notified.

For the fore going reasons, this Court should grant the Petitioners request and should issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit and remand the case back to the U.S. District Court of new Hampshire so that this case may be RESOLVED ON ITS MERITS BY A JURY OF HIS PEERS.

Respectfully,

Luther C. Perkins, Pro Se
7315 Cordoba Avenue
New Port Richey, Fla, 34653
Tel. (813-842-8674) Florida (10-/15 to 4/15)
87 Pow River Road
East Kingston, N.H. 03827
Tel. 603 642 7765 N.H. (4/5 to 10/15)

LCP/lcp

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-1645

LUTHER C. PERKINS
Plaintiff Appellant
v
JESSE BROWN, SECRETARY
U. S. DEPARTMENT OF VETERANS AFFAIRS
Defendant , Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Joseph A. DiClerico,U.S. District Judge]

Before
Selya, Stahl and Lynch
Circuit Judge

Luther C. Perkins, on brief pro se.
Paul M. Gagnon, United States Attorney, and T. David Plourde, Assistant United States Attorney, on brief for appellee.

December 5, 1995

Per curiam. We have carefully reviewed the parties' briefs and the record on appeal. We affirm the judgment of the district court essentially for the reasons stated in the order dated May 25, 1995. We add that, under our system of representative litigation, clients are ordinarily held responsible for the acts and omissions of their attorneys. see Thibeault v Square D Co., 960 F. 2d 239, 246 (1st cir. 1992) ({W}hile '[t] he argument that the sins of the attorney should not be visited upon the client is a seductive one, ... its siren call is overborne by the nature___ of the adversary system/'" (quoting Damiani v Rhode Island Hosp., 704 f. 2D 12, 16 (1st cir. 1983); See also Link v Wabash R. Co. 370 U.S. 626, 633-34 (1962) Although we are not unsympathetic

with appellant's plight, we agree that he is left to his remedies against counsel.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF N.H.

Luther C. Perkins

v Civil No. 94-357-JD

Jesse Brown, Secretary
Department of Veterans Affairs
Veterans Administration

RULING

The court finds that, for purposes of the Rule 12(B)(6) inquiry, the failure to file resulted solely from the gross error of the plaintiff's attorney and his law firm.. These circumstances may justify equitable tolling under Volk. See 516 F. Supp at 161-162. However, even misconduct of the magnitude_ alleged in this case does not warrant equitable tolling under the more narrow view of the doctrine recently articulated by the Supreme Courts and other courts sitting in this and other circuits. See, e.g., Irwin, 111 S.Ct. at 4157-8; Silva, F. Supp at 554. Thus, the plaintiff's lawsuit is time-barred and not subject to equitable tolling.

The court, taking all factual averments in the complaint as true, has determined that the plaintiff cannot recover on any viable theory under the ADEA because his lawsuit is untimely. According the complaint must be dismissed.[1]

---

[1] The plaintiff is not left without any remedy since the allegations concerning the conduct of counsel may support a separate civil action against the appropriate defendants

SO ORDERED
May 25, 1995

/s/ Joseph A. DiClerico, Jr.
Chief Judge.

APPENDIX C

U.S. District Court
District of New Hampshire

LUTHER C. PERKINS, Plaintiff
v
ANTHONY J. PRINCIPI, ACTING SECRETARY DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER
Defendant

COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION

1 Jurisdiction is based upon the government of the United States of America as the defendant. This matter alleges a violation of the Age in Employment act of 1967 29 U.S.C. Section 621 as more fully set forth below.

THE PARTIES

1.The Plaintiff, Luther C. Perkins, ADDRESS, is a natural person formerly employed by the Veterans Administration as Chief of Pharmacy Services at the Veterans Administration Medical Center at Castle Point.

2. The Defendant, Anthony J. Principi, ADDRESS, is the acting director of the Medical Center at Castle Point, New York.

FACTS

3.The Plaintiff arrived at the Veteran, Administration Medical Center, Castle Point, (here-in-after) referred to as VAMCCP as Chief of Pharmacy Service on or about July 3, 1988.

4.On or about the date of Plaintiff's assumption of duties, the VAMCCP was classified as a Class III hospital.

5. The Plaintiff served as Chief of Pharmacy Services, said position classified as a GS-660-12 under Title 5.

6.The plaintiff served as Chief of Pharmacy service until the date of his retirement on about 30 June 1991.

7. On or about the date of the Plaintiffs assumption of duties as Chief of Pharmacy Service at VAMCCP , the hospital pharmacy suffered certain administration problems, such as long delays providing prescription medications to customer, insufficient inventory control, excessive customer complaints about pharmacy service and problems associated with the behavior of employees.

8. Plaintiff arrived at the VAMCCP and assumed the administrative duties attendant with the position, performing satisfactorily and earning favorable annual performance appraisals from his superiors.

9. On or about 6 February 1989, Veteran's Administration Pharmacy Chiefs at similar positions in Class III hospitals nationwide were being promoted from a GS-660-12 to a GS-660-13.

10 On or about the same date, Alex Alexander, MD Chief of Staff submitted to the VAMCCP personnel office materials necessary for Plaintiff to be promoted in a manner consistent with Plaintiff's pharmacist colleagues nationwide.

11. The Class III hospital Pharmacy Chief's promotion from a GS-600-12 to GS-660-13 resulted from a nationwide reclassification of the Pharmacy Chief position and was not the result of a change of duties associated with the Pharmacy Chiefs Position.

12 All pharmacists nationwide were converted to pay status from Title 5 to Title 38.

13.The conversion from title 5 to title 38 and the reclassification of the Chief of Pharmacy services position from GS-660-12 to GS-660-13 were actions taken nationwide and affected all persons similarly situated with the Plaintiff.

14. Plaintiff learned that his application for the reclassification promotion was not submitted in a manner that would result in the reclassification from a Gs-660-12 to GS-660-13, but had been submitted so Plaintiff would continue under Title 38 as a GS-660-12 employee.

15. Plaintiff met all training and performance qualifications both to be assigned to the position of Chief of Pharmacy services and to be reclassified from GS-660-12 to GS-660-13 under Title 38.

16. Plaintiff's promotion was recommended by several of the VAMCCP Chiefs of staff

17.On or about the time Plaintiff's application for reclassification was submitted, the application that failed to request reclassification at the higher grade, six (6) Chiefs of Administrative Service at VAMCCP were also recommended for upgrading.

18.The Veterans Administration Central Office, (hereinafter VACO) did not approve the promotions of any of the six (6) Chiefs of Administrative Service.

19.However, the Fiscal Service Chief of the VAMCCP did receive a promotion in spite of failing to gain VACO approval of the same.

20.On or about the date of the promotion of the Fiscal Service Chief, he was Forty-Two (42) years old while the Plaintiff was sixty-four (64) years old.

21.The VAMCCP failed to provide Plaintiff with any information which would justify the refusal to reclassify his Chief of Pharmacy Services position from GS_660-12 to GS-660-13.

COUNT I

22.The Plaintiff reasserts each allegation contained in paragraphs 1-21 as if fully set forth herein.

23.The facts as alleged by Plaintiff constitutes unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621 et seq.

24.The Plaintiff asserts that Defendant's refusal to promote him was based upon Plaintiff's age and that Defendant failed to articulate specific non-discriminatory reasons for the refusal to promote Plaintiff

25.The Plaintiff asserts that Defendant's actions were motivated by discrimination.

26.The Defendant's refusal to promote Plaintiff constituted an impermissible and unlawful violation of the Age Discrimination in Employment Act of 1967.

27. The Plaintiff has suffered lost wages, pain suffering and humiliation as a result of the Defendants discriminatory actions.he Plaintiff has suffered lost wages, pain, suffering.

28. The Plaintiff demands his right to trial by jury.

RESPECTFULLY SUBMITTED, Dated

Luther C. Perkins , Plaintiff
Pow River Road #85
East Kingston, N.H. 03827
/s/ LUTHER C. PERKINS
Daniel J. Cochran, Esq.
47 Depot Road
East Kingston, N.H. 03827
(603) 642-5311
(603) 642-7786 (FAX)

APPENDIX D

U.S. DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE.

LUTHER C. PERKINS,
Plaintiff

v

JESSE BROWN, SECRETARY
DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION,
Defendant

MOTION TO FILE LATE ANSWER

Now comes the Plaintiff, Luther C. Perkins, and requests that this honorable court grant his motion to file a late answer. Said motion is based on the following grounds:

1. That the Plaintiff is alleging that the above-named Defendant engaged in an act of unlawful discrimination against the Plaintiff in violation of Age Discrimination in Employment act of 1967, as amended, 20 U.S.C. Section 621 et seq.

2. The Plaintiff initially filed a complaint pro se with the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC" on January 24, 1991. Subsequently a final agency decision (hereinafter referred to as "FAD") was rendered on February 18, 1993, adopting the administrative judge's finding of no discrimination.

3. The Plaintiff appealed, pro se, the FAD. Luther C. Perkins v. Department of Veteran Affairs, EEOC appeal No 01931919. On appeal, the presiding jurist upheld the FAD of no discrimination. ID. It is unclear when the Plaintiff received the decision, but the date of the decision was September 21, 1993.

4. The EEOC decision, received by the Plaintiff, included the assertion that the Plaintiff had the right to file a civil action in the appropriate United States District Court. Said assertion was ambiguous as to whether the Plaintiff had ninety (90) days or thirty(30) days to file the action in the appropriate United States District Court.

5. The Plaintiff, then, retained the assistance of counsel, Daniel J.Cochran, Esq. Attorney Cochran asserts that he timely filed a complaint in the United States District Court in New Hampshire. On June 9, l994, however, the Plaintiff sought the status of his complaint and was informed by a clerk in the United States District Court that no complaint had ever been filed on his behalf in said court.

6. The Plaintiff is now seeking to file his complaint on a Pro se basis, and also is requesting the appointment of counsel to be paid for by the court.

7. The Plaintiff asserts that it would be unjust to deny his complaint for late filing. His attorney asserts he filed the complaint. If the complaint was not filed, the Plaintiff should not be held accountable for the negligence of his counsel at the time.

Wherefore, the Plaintiff asks this honorable court to:

a. Grant his motion to file a late answer;
b. And for such other relief as may be just and equitable.

DATED 7-8-94

RESPECTFULLY SUBMITTED
Luther C. Perkins, , Plaintiff
87 Pow Wow River Road
East Kingston, N.H. 03827
/s/ Luther C. Perkins
Keri J. Marshall, Esq.
47 Depot Road
East Kingston, N.H. 03827
/s/ Keri Marshall

APPENDIX E

Luther C. Perkins Pro Se
Plaintiff

v Civil No. F-1-94-357-JD

Jesse Brown,Secretary
Department of Veterans Affairs
Veterans Administration
Defendant

To: U.S. District Court
District of New Hampshire
55 Pleasant Street
Concord, N.H. 03301

In reference to the Defendant's request to dismiss pursuant to rule 12 (B) (6) of the Federal Rules of Civil Procedure, the Plaintiff respectfully requests that there be an equitable tolling (waiver) of rule 12 (B) (6) for the following reasons:

1. All the dead lines were met by the Plaintiff during the Administrative process of the Equal Employment complaint

2. The Defendant was not ruled by these time limits. (See Attached document A-9-9).

3. After the final decision by the Equal Employment Opportunity Commission, the Plaintiff retained Counsel, Daniel J. Cochran, Esq. Attorney Cochran asserts that he timely filed a complaint in the United States District Court of N.H. Plaintiff had ABSOLUTELY NO REASON to disbelieve this statement by COUNSEL.

4. Plaintiff reviewed the complaint with Counsel on October 14, 1993. Counsel stated the complaint would be filed with the U.S. District Court on the following day (Copy of complaint with Signature of Plaintiff attached.). Plaintiff had ABSOLUTELY NO REASON to question the INTEGRITY OF A DULY LICENSED ATTORNEY OF the State of N.H. during this period.

5. Also at this time Attorney Cochran stated that a request for appointment of Counsel and a Forma Pauperis request which

was signed on September 27, 1993 would be filed. (See Attached). (Again the Plaintiff had no reason to doubt the INTEGRITY of a duly licensed Attorney of the State of New Hampshire). All of this with in Thirty (30) days of the Ninety (90) days of the Statute of Limitations.

6. At this time the Plaintiff left with Attorney Cochran a check for $125 to be put in Escrow for use to pay the filing fee if Forma Pauperis request was denied.

7. The Plaintiff having in good faith acted to the best of his ability and knowledge in having turned the complaint over to legal counsel with the expectation that all legal formalities and time limits would be met. Mr. Cochran assured the plaintiff that this would be done. Mr. Cochran also assured the Plaintiff that he would be informed of any on-going developments. The Plaintiff then left for Florida. Again the Plaintiff had NO reason to doubt the INTEGRITY of a duly licensed Attorney of the State of N.H.

8. After receiving a statement date December 1, 1993 (See attached) from Attorney Cochran called to have Mr. Cochran to explain discrepancies in his statement. Specifically why the escrow amount of $125 was shown as part of payment for services. Each time the Plaintiff called, Mr. Cochran's secretary said he would call back. The charge of $4.00 was proof to the Plaintiff that the complaint was definitely filed, for as to the best of my knowledge there would be no other reason for this charge. This should be a reasonable assumption.

9. Plaintiff returned from Florida the 1st of May 1994 and tried many times to reach Attorney Cochran by Office Visit or Telephone. The secretary each time informed the Plaintiff that Mr. Cochran would contact me.

10. On May 27, 1994 Plaintiff finally contacted Attorney Cochran about Veterans Administration Equal" Opportunity complaint by telephone. Attorney Cochran stated, " HE HAD RECEIVED THE DECISION ON FEDERAL CIVIL SUIT AND DID NOT RE-FILE AS THE STATUTE OF LIMITATIONS HAD RUN OUT. ALSO PAYMENT WOULD BE ON THE AMOUNT OF ECONOMIC DAMAGE." IT WAS AT THIS TIME THE PLAINTIFF BEGAN TO DOUBT THE INTEGRITY AND CAPABILITIES OF A DULY LICENSED

ATTORNEY OF THE STATE OF N.H. NAMELY DANIEL COCHRAN.

11. After trying for about a week to obtain a copy of items filed in U.S. District Court in Concord, N.H. Plaintiff received a copy of the complaint (See Attached). Plaintiff took this copy to the U.S. District Court in Concord on June 9, 1994 at 1 P.M. to see when this appeal was filed. The Clerk Brenda, could find NO RECORD0. Brenda asked me to call back the next day. Brenda said she called Attorney Cochran's office and Mr. Cochran's secretary said she would give Mr. Cochran the message and would call back. Plaintiff called back the following day and Brenda said Attorney Cochran did not return her call.

12. About July 7, 1994 Attorney Marshall asked the Plaintiff if I would be willing to have a three way telephone conversation with Attorney Cochran as to the status of the Equal Opportunity Complaint

13. On this date the Plaintiff was informed that Attorney Cochran was no longer affiliated with Marshall Law. The call was made about 7 A.M. and the first time Attorney Cochran came on the phone after his Mother called him. Mr. Cochran hung up. Attorney Marshall called again and again his mother had him come to the phone. Attorney Marshall informed him I (Mr. Perkins) was on the line and asked what was the status of the Equal Employment Complaint. Mr.Cochran clearly stated " I GAVE YOU THE F—ING ANSWER" AND AGAIN HUNG UP._The plaintiff has found out within the prior two (2) weeks of this request that Mr. Daniel Cochran has been disbarred from the practice of law in the State of N.H. The Plaintiff does now know the reason. The court should be able to find out the reason.

14. The Plaintiff was NOT concerned about the length of time for a response from the court after the filing of the

complaint. (The Plaintiff had NO reason to believe the complaint was NOT filed). From my experience with the government in the Administrative process. It was Months between responses and yet the Plaintiff was given definite limits. (See attached A-9-9, Letters dated January 17, 1991, October 11, 1991 and March 24, 1992). Due to Plaintiff's lack of knowledge and experience in the Judicial System and faith in an Attorney at Law were the factors in this thinking. From the events of June 1994 to this date the Plaintiff has been amazed and astounded with the efficiency and expeditious handling of all matters in the U.S. District Court of N.H.

15. Ms. Marshall, Attorney at Law can be contacted at:

Marshall Law Office
47 Depot Road
East Kingston, N.H. 03827
Tel. 603-642-5311

for any information or knowledge she may have in reference to Mr. Cochran.

17. There must be as many mitigating rules, regulations and cases covering extenuating circumstances in the tolling (waiver of rule 12 (b)(6) as there is for the dismissal of the case.

18. As a Professional for over (40) years, the Plaintiff was appalled at the ethics and actions of Mr. Cochran. The Plaintiff requested the court at this time that the actions of Mr. Cochran DO NOT PREDICATE THE FINAL DECISION IN THIS CASE. The plaintiff also asserts that it would be unjust to deny his request for late filing. If the complaint was not filed, the Plaintiff should not be held accountable for the negligence of his counsel at the time.

19. WHEREFORE THE PLAINTIFF RESPECTFULLY REQUESTS THAT THE DEFENDANTS MOTION TO DISMISS PURSUANT TO RULE 12 (b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE BE DENIED

Respectfully submitted;
/s/ Luther C. Perkins, Plaintiff, Pro Se

IV. HOUSEHOLD EXPENSES;

1. Telephone $480.00	8. Groceries $4500.00/yr
2. Utilities $600.00	9. Medical $1035.46
6. Gas 500.0 0	12. Property $1566.25
7. Insurance $328.00	13. Rend. Fla. $2364.00
Fla. Home $388.00	14. Car.Reg. $235.00
Auto $710.16	

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

September 27, 1993 /s/ Luther C. Perkins
DATE SIGNATURE

Marshall Law,
Tucker Professional Bldg
47 Depot Road, East Kingston, NH 03827-2002
Keri Marshall & Daniel Cochran

Invoice Submitted to:: December 1, 1993
Luther C. Perkins
87 Pow Wow River Road
East Kingston, NH. 03827

	Hours	Amount
Professional Services		
10/7/ Initial Conference with Client	1.00	No Charge
10/14/93 Draft Complaint	1.00	100.00
Conference with Client	.20	20.00
Preparation and execute of will and trust	1.00	100.00
For Profession services rendered	3.20	$220.00
10/19/93 Fax Use Charges		$4.00
10/22/93 Postage		.58
Total Cost		$224.58
Previous Balance		$60.00
10/18/93 Payment Thank you. 1499		($125.00)
11/1/93 Payment-thank you: 1503		($60.00)
Total Payments		($185.00)
Balance Due		$99.58

APPENDIX F

To: U.S. District Court:

Luther C. Perkins , Pro s
v
Jesse Brown, Secretary
Department of Veterans Affairs
Veterans Administration

At this time the Plaintiff, Luther C. Perkins, Pro se, wishes to appeal the decision of the U.S. District Court for the District of New Hampshire for the following reasons.

1. The VIABLE REMEDY stated by the COURT in NO way resolves the complaint of AGE DISCRIMINATION. The Age Discrimination in Employment Act (ADEA) would be clearly violated if the final decision and the COMPLAINT RESOLVED due to a GROSS ERROR by an ATTORNEY AT LAW, which would not comply with the intent of the ADEA act. "ADEA is remedial and humanitarian legislation and should be LIBERALLY INTERPRETED TO EFFECTUATE THE CONGRESSIONAL PURPOSE OF ENDING AGE DISCRIMINATION IN EMPLOYMENT

2. Especially when the PLAINTIFF was DULY DILIGENT in the submitting of all APPEALS and ANSWERS within any time frame requested by the DEFENDANT, EQUAL EMPLOYMENT COMMISSION and the COURTS. The Defendant, Equal Employment Commission and the Courts were NOT limited by an time frame, but have taken up to EIGHTEEN (18) MONTHS to return answers and decisions.

3. A member of the LEGAL SYSTEM made the GROSS ERROR in NOT filing the COMPLAINT in a TIMELY

MANNER but the PLAINTIFF receives the PUNISHMENT and PENALTY. Is this Justice?

4. The JUDICIAL SYSTEM must have a REMEDY and REFERENCES in its LEGAL LIBRARIES where a COMPLAINT is carried to its LOGICAL CONCLUSION by a TRIAL BY JURY OF HIS PEERS and NOT RESOLVED by the INEPTITUDE of a DULY LICENSED ATTORNEY, and a MEMBER OF THE COURT.

5. The PLAINTIFF retained LEGAL COUNSEL for the following reason: "a person who represents himself has a fool for counsel." This saying can be BLATANTLY WRONG. The PLAINTIFF would have made sure this COMPLAINT was filed in THIRTY (30) DAYS and not waited the NINETY (90) days as required and DELIVERED IT BY HAND to make sure it arrived within the time limits if needed.

6. Only WITNESSES FAVORABLE to the Defendant were allowed at the Administrative HEARING. See Attached. NO MEDICAL OR CLINICAL PERSONNEL directly involved in the Operation of the Pharmacy were allowed to testify: J.. George, M.D.,P. Carroll, D.M.D, A. Messina, R.Ph., J.Ramirez, R.Ph., M.Budin, M.D., Dr. Martinko, D. Murray, L. Cobozzi, R.Ph. and Mr. Forrester, R.Ph. Also Dr. Alexander who's statement is enclosed and DEFINITELY would not have been REPETITIVE. John Walsh and John Fleenor were two of the Chief's involved in the discrimination complaint and mirrored the Director's statement. Very biased hearing. Also the time allowed for the hearing was limited by the Administrative Judge.

;7. The COURT in its decision seems to feel that MONEY is the OBJECT in its findings. The Plaintiff before the Administrative hearing offered to settle for the promotion to GS-13 and $7.000.00 which would have been the amount of retirement pay

differential. Receiving RECOGNITION for the ACCOMPLISHMENTS was the MAIN CONCERN, even at my ADVANCE AGE. Also so that others would not have to SUFFER the HUMILIATION of AGE DISCRIMINATION.

Therefore the PLAINTIFF humbly requests that the DUE PROCESS OF MY PEERS F LAW that leads to a DECISION made by a JURY presented with all facts from DOCUMENTATION and WITNESSES CONTINUE. That this COMPLAINT NOT be finalized by an ATTORNEY-AT LAW who did not live up to his SWORN RESPONSIBILITIES, AND CONDONED BY A COURT OF LAW.

Respectfully submitted,

/s/ Luther C. Perkins,
Luther C. Perkins, B.S.,R.Ph.

APPENDIX G

Appeal of the Plaintiff to the U.S. Court of Appeals for the First Circuit

LUTHER C. PERKINS, Pro se
Plaintiff - Appellant

v No. 95-1645

JESSE BROWN, SECRETARY
U.S. DEPARTMENT OF VETERANS AFFAIRS.

GROSS DERELICTION OF DUTY BY A SWORN OFFICER OF THE COURT AND CONCURRENCE BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE HAS DEPRIVED THE PLAINTIFF - APPELLANT OF HIS RIGHT TO A TRIAL BY JURY. (Exhibit A: THE BILL OF RIGHTS)

The Officer of the Court (Attorney) neglected to file the COMPLAINT within the Statute of Limitations although the complaint was prepared on October 14, 1993 by the Attorney with the Assistance of the Plaintiff, Deadline for filing this complaint was December 22, 1993, ample time to fax or mail the complaint to Concord, N.H. from East Kingston, N.H.

The Plaintiff-Appellant believed the complaint had been filed in a timely manner by the Statement from Marshall Law, and also by assurance from the attorney that it would be done.

Accordingly, the Appellant respectfully requests that the U.S. Court of Appeals for the First Circuit, Boston, Mass. remand the case for resolution of the disputed factual issue to the U.S. District Court of New Hampshire.

The Appellant respectfully requests to appeal the order of the United States District Court of the District of N.H. dated May 25, 1995, which the Court of Appeals for the First Circuit has previously received from the Appellant and also the District Court.

BACKGROUND

The defendant hired the plaintiff, a pharmacist, in July 1988, to serve as Chief of Pharmacy service for the VA Medical Center in Castle Point, New York. In February 1989 the VA reclassified the Chief of Pharmacy position (the difficulty of the position as performed at the time of reclassification rated a HIGHER GRADE in contrast to an upgrade which is defined as duties ADDED to a position to warrant a higher grade) such as to make the plaintiff eligible for a promotion from a "GS-660-12" to a GS-660-13" grade and pay level. The plaintiff who was sixty-four years of age at the time, and is now sixty-eight years of age) was not promoted even though the plaintiff had satisfied all the training and performance qualifications for the promotion.

On January 23, 1991, the plaintiff filed a timely employment discrimination complaint with the VA alleging age discrimination in the denial of his request for promotion. EXHIBIT C.

On February 27, 1991, a second complaint was filed. The director of Castle Point, N.Y. facility stated that "if I continued and did not withdraw my complaint, my reputation and status would be ruined and dragged through the mud. He said he had enough on me to accomplish this. EXHIBIT D.

On June 7, 1991 the Equal Employment Opportunity Commission, Office of Federal Operations combined the two complaints into one case, resulting in the erroneous Analysis on Page 4 of the Decision of the E.E.O.C. which found that the comments made by the Director of Castle Point, N. Y. were not in the original complaint. These comments were not discussed at the Administrative hearing due to time limitation by the Administrative Judge. (Exhibit DD AND E).

The Plaintiff's complaint was not resolved through the Informal Adjustment process and, on June 2, 1992 (18 months later, the VA requested that the Equal Employment Opportunity Commission (EEOC) assign the dispute to one of its administrative judges. (AJ) The AJ conducted an administrative hearing on August 18, 1992 and September 17, 1992 with strict time limitations and only witnesses favorable to the defendant

(Administrative) and all witnesses but one favorable to the plaintiff (Clinical) were disallowed. (Exhibit F., Page l,2,& 3)

In reference to the Administrative Judge's decision, I maintain that the sworn testimony of the Chief of Staff, the Plaintiff's direct Supervisor, Alex Alexander, M.D. would not have been repetitive. (Exhibit G., pages l-5).

DISCUSSION

The Age Discrimination in Employment Act was enacted for the sole purpose of discouraging Age Discrimination. This decision by the U.S. District Court absolves the defendant of all responsibilities of his action and does not deter further acts of discrimination by the defendant, but transfers the penalty and punishment to the plaintiff who diligently and at all times pursued his right to a fair and equitable decision by a Jury of his peers.

All of the references and cases cited by the defendant and the U.S. District Court for the tolling or waiver of the Statute of Limitations are where the plaintiff and the plaintiff's attorney are both acting in the best interest of the plaintiff.

Therefore, as the plaintiff's attorney failed to perform his sworn duties in a manner consistent with good ethical procedure, but rather exhibited gross negligence and dereliction of duty, the plaintiff maintains that the decision by the U.S. District Court is null and void.

The Age Discrimination Act of l967 7(d) U.S.C. 626 d cites that the filing period contained in the Age Discrimination in Employment Act is subject to equitable modification.

"The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment."

"Requirement of ADEA that employee file notice of intent to sue within 180 days after the alleged unlawful practice occurred should be interpreted as being subject to possible tolling and estoppel."

Volk V. Multi-Media, in 5116 F. Supp. 157, 745 F 2d 411 "Plaintiffs have also been granted equitable tolling where the untimely filing was due to gross attorney error"

111 S.C. 453 (1990) page 53 "(3) subject to equitable tolling but (4) equitable tolling did not extend to what was, at best, a garden variety claim of excusable neglect."

The gross dereliction of duty by a sworn officer of the court does not in the opinion of the plaintiff conform to the definition of a "Garden Variety Claim" as used by the U.S. District Court.

VOLK V Multi media, Inc. 516 F Supp 157-162 "Plaintiff's Attorney who effectively stood in Plaintiff's Shoes after being retained however was less than diligent. His failure to file required notice on time was the antithesis of diligence. Further more, there is no excuse for the attorney's ignorance of the notice requirement." The attorney **was not** ignorant of the notice requirement as it was clearly explained by the plaintiff at the time the attorney was retained by the PLAINTIFF"

If it had been a situation where the attorney did nothing for an extended period of time, or had proceeded in an intelligent and reasonable manner, than the outcome might have been different."

"We find ourselves in a situation where a plaintiff with a plausible claim may not be able to fully litigate that claim because of the sloppy, inept practice of his attorney, the additional equitable consideration we find applicable in this case is whether the error's of plaintiff's counsel are of the type that should require us to visit the consequences of those errors upon the client."

"...on the other hand, defendant was not prejudiced by the delay in filing." The defendant in this case definitely would not be prejudiced by a delay as it had been nearly five (5) years in the process due to non-action by the defendant."

Also reference the Report of Contact Dated Dec. 5, 1991: Mr. Tognettis's reply to the request from EEOC for a proposed disposition within 90 days. " As for the 90 day time frame for issuing a proposed disposition. Mr. Tognetti said don't worry if we don't comply, because we most likely won't" Exhibit H.

The U.S. District Court stated "In the end, the court may grant a motion to dismiss under Rule 12(b)(6) "only if it clearly appears, according to the facts alleged, that the plaintiff cannot

recover on any viable theory." The U.S. District Courts remedy is worse than the disease. It would only open a Pandora's Box of problems and prolong the Plaintiff's emotional stress, mental stress and creating financial difficulties without resolving the basic complaint of age discrimination and slanderous statements. This is a very basic answer, at my age and financial resources, this is DEFINITELY NOT A viable theory. (Exhibit I).

A Registered Pharmacist making a basic error as gross and of such magnitude as the error by the Attorney would need Divine assistance. Legal errors can be remedied by a the scratching of a pen. Tolling in this case is the remedy and would show the way to a speedy and just resolution with a trial by Jury.

When a life time of accomplishment and reputation is at stake, the plaintiff contends that this is NOT a "Garden Variety Claim" and should be resolved by a full presentation of facts and statements by a jury and not resolved out of " vague sympathy for particular litigants" (Exhibit J & K)

SUMMARY

1. The case should be remanded to the U.S. District Court for the Discrimination complaint to be resolved expeditiously and judicially by a jury.
2. Tolling is a standard procedure for Gross Dereliction of duty by an attorney.
3. The resolving of the main issue of age discrimination cannot be resolved by the viable theory of Malpractice suit by the Plaintiff.
4. The intent of the Age Discrimination Act would be fulfilled by a waiver of the Statute of Limitations.
5. The Plaintiff should not suffer the consequences and punishment because of the gross dereliction of duty by an attorney. Cruel and unusual punishment in this instance.
6. The decision should not revolve about the need for lowering the case load in U.S. District Courts. (Exhibit L)
7. There will be a grave travesty of justice if this decision is in favor of an Attorney and ***not*** in favor of the Plaintiff in his search for Justice.

Therefore, the Appellant, Luther C. Perkins, respectfully requests that the U.S. Court of Appeals for the First Circuit, Boston, Mass. remand the case for resolution of the disputed factual issue to the U.S. District Court of New Hampshire.

Respectfully submitted,
/s/ Luther C. Perkins
LUTHER C. PERKINS, PRO SE
APPELLANT
LCP/jpw

APPENDIX H

LUTHER C. PERKINS
Plaintiff- Appellant

v No. 95-1645

JESSE BROWN, SECRETARY
DEPT. OF VETERANS AFFAIRS
Defendant - Appellee

PLAINTIFF MOTION TO DISMISS GOVERNMENTS' MOTION TO DISMISS WITH ORAL ARGUMENT

The Plaintiff-Appellee STATES that the PERTINENT FACTS and LEGAL ARGUMENTS are NOT ADEQUATELY PRESENTED in the brief and RECORD and the decisional process would MOST DEFINITELY BE AIDED BY ORAL ARGUMENT per the following:

1. The U.S. Civil Court's statement "However, even misconduct of the magnitude alleged in this case does not warrant equitable tolling under the MORE NARROW VIEW of the doctrine recently articulated by the Supreme Court and other courts sitting in this and other circuits." How may the Plaintiff ascertain the narrowness or breadth of this doctrine? Is it so narrow that it prevents justice be done due to an Attorney' inability to put a complaint into an envelope and mailing it" Preposterous!!!!

2. Why is the Plaintiff now the Defendant where he started out as the Plaintiff in an age discrimination case?

3. Why is the Attorney for the Defendant now DEFENDING actions or non-actions of a fellow attorney?

4. Is there a double standard in the Judicial System for professionals? Example: An attorney prepares a complaint for a client but does not put the complaint in an envelope and mail it. The Client is at fault. A Registered Pharmacist prepares a prescription, but does not put the medication in the bottle and does not give it to the patient. THE PHARMACIST IS AT FAULT FOR THE RESULTS.

5. Is there a definite law that states the client must pay the penalty and receive the punishment for the action or non-action of an attorney? Under the Judicial System do Attorneys receive favored treatment?

6. Is the training and knowledge obtained by an Attorney in many years of training in law so suspect that they are unable to do the basic function as to putting a complaint in an envelope and mailing or faxing the same to its destination? If not they should be ABLE to give it to a secretary and this function would be definitely performed in a timely and efficient manner.

7. Why does not a Law Firm in this age of technology have a system that prevents the Statute of Limitations to run out before the complaint is filed? Therefore I repeat , return this responsibility to a competent secretary.

8. If the attorney was incapable of functioning rationally in this case, why was not the plaintiff so informed? The Plaintiff was able to deliver other information within time limits as prescribed.

9. A representative of the Law Firm (Marshall Law) and Mr. Cochran need to be present to explain the rationale of their actions or non-actions.

10. Is this a method of lowering the case load in age discrimination cases?

11. Do the courts believe that age discrimination cases are "frivolous" or "Garden Type Cases" as stated by the U.S. District Court in N.H.

12. The plaintiff needs to explain to the court in Person that a financial settlement at the age of 69 is not a prerequisite or "Viable alternative" in this case.

13. The Federal Rule of Civil Procedure 4 (m) provides that the Court may extend the time for service providing the Plaintiff shows good cause for the delay. If the GOOD CAUSE in this case IS NOT APPROPRIATE, WHAT IS GOOD CAUSE?

14. Why is the Plaintiff in an age discrimination complaint limited by time to reply but the defendant has no such limitations even though time is a serious consideration?

15. Is Lady Justice so blind, that there is no common sense in the Judicial system?

16. Is Justice predicated on balance of evidence of facts and documentation or the "narrow view" of the courts?

17. Why are there as many interpretations of one law as there are lawyers?

18. Even the Bar Association of N.H. has admitted the incompetence of this ATTORNEY BY SUSPENDING MR COCHRAN'S RIGHT TO PRACTICE LAW. and yet the PLAINTIFF MUST SUFFER THE CONSEQUENCES OF HIS INCOMPETENCE. Is this Justice ??

THE MOST IMPORTANT REASON AND THE MOST IMPORTANT INFORMATION AND THE DIRE NEED FOR ORAL ARGUMENT IS FOR THE COURT TO SUBPOENA THE FOLLOWING:

Mr. Daniel Cochran
513 South Main Street
Manchester, N.H. #031102

and Keri Marshall, Esq.
Marshall Law
Tucker Professional Building
47 Depot Road
East Kingston, N.H. 03827-2002

To appear in the Court on the date of the hearing to give sworn statements and testify as to the reason that the Statute of Limitations was allowed to expire in complete violation of their sworn Oath of Office. If the Plaintiff is to pay the penalty and receive the punishments due to the non-action of the above, the Plaintiff should be informed of the rationale behind this decision by the Attorney's. THEREFORE THE PLAINTIFF REQUESTS THE U.S. COURT OF APPEALS TO SUBPOENA the above to an appearance on the date of the hearing or inform the Plaintiff in the manner of obtaining the appearance of hostile witnesses.

19. Why does the Age Discrimination in Employment Act of 1967 definitely state that the Statute of Limitations is subject to tolling? Is it to prevent miscarriages of justice in cases like this? Therefore for the many reasons given above and others the Plaintiff requests that the Court dismiss the Department of Veterans Affairs request to Dispense with Oral argument. Justice would not be served.

Respectfully,

/s/ Luther C. Perkins
Luther C. Perkins, R.Ph. Retired R.Ph,
Plaintiff - Appellant
Dated: September 7, 1995

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LUTHER C. PERKINS
Plaintiff-Appellant
v No. 95-1645
JESSE BROWN, Secretary
Dept. of Veterans Affairs
Defendant-Appellee

PLAINTIFF- APPELLANT'S MOTION
TO REMAND THE CASE BACK TO THE U.S. DISTRICT COURT OF N.H.

According to the BILL OF RIGHTS Amendment VII "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise be re-examined in any Court of The United States, than according to the rules of the common law."

Am refiling the MOTION as the Plaintiff-Appellant does not feel that the issue remanding the case back to the U.S. District Court of N.H. was clear as a MOTION in the original appeal.

Therefore the Plaintiff-Appellant makes the motion that the case be REMANDED to the U.S. DISTRICT COURT OF N.H. FOR RESOLUTION of the disputed factual issue.

The fact that Mr. Cochran PURLOINED the filing fee of $125 and then PLAGIARIZED the STATEMENT OF MARSHALL LAW as a DELIBERATE attempt to MISLEAD the PLAINTIFF- APPELLANT to believe the complaint had been filed to DEPRIVE THE PLAINTIFF OF THE RIGHT TO A TRIAL BY JURY AS REQUIRED BY THE BILL OF RIGHTS. Amendment VI

The viable alternative suggested by the U.S. District Court would not be practical as a malpractice suit against an Attorney who has to purloin a filing fee of $125.00 would be very expensive and to receive a monetary award from Mr. Cochran would be impossible. This would only be a financial reward for the Attorney's involved and how would the Plaintiff be aware of the quality of the Attorney. This would be a no win situation for the Plaintiff and in no way resolve the issue of discrimination and repair the damage of the Plaintiff's reputation. Mr. Cochran's right to practice law in New Hampshire has been suspended.. Time is a very definite factor in age discrimination cases especially when the plaintiff has reached the age of 69.

Therefore the Plaintiff-Appellant requests that the Court grant the MOTION to remand the case back to the U.S. District Court of N.H. for resolution of the disputed factual issue FORTH-WITH.

/s/ Luther_C. Perkins, B.S., R.Ph.
Plaintiff-Appellant.

APPENDIX J

SWORN STATEMENT BY THE CHIEF OF STAFF OF THE MEDICAL CENTER , CASTLE POINT, NEW YORK

1. Q. First of all may I request that I record our conversation? Do I have your permission?

2. Q. Will you affirm that the statements you make will be true to the best of your knowledge.

A. I do.

3. Q. What is your present title?

A. Chief of Staff, VA Medical Center, Fort Howard, Maryland

4. Q. What is your name?.

A. C. Alex Alexander, M.D.

5. Q. What is your age?

A. Born March l, l935

6. Q. Did you at one time work as Chief of Staff at VAMC Castle Point?

A. Yes, from l983 to May l990 as Chief of Staff with a six month sabbatical absence (October l, l989 through April l, l990). at the Uniformed Services University of Health Sciences, Bethesda, Maryland, as Clinical Professor in the Division of Health Services Administration.

7. Q. During that period of time did you interview and hire a Chief of Pharmacy by the name of Luther Perkins?

A. Yes, I interviewed him and recommended to VA Central Office his centralized appointment as Chief, Pharmacy Service at the VA Medical Center, Castle Point, New York.

8. Q. What is it that you saw in him that caused you to feel that he could possible perform successfully as a Chief of Pharmacy Service?

9. A.. His prior work record, his immediate supervisor's evaluation, the Martinsburg , VA Medical Center Director's (Mr.Billes) recommendation and above all his very successful ownership of a private pharmacy and prior leadership/entrepreneurial background in the private sector led me to feel that he would do better than the two prior Chief "s of

Pharmacy Service who had worked at the Castle Point VA Medical Center.

Q. During your supervision of him did he make improvements in the Pharmacy Service?

A. Yes, and very commendable ones in terms of increasing productivity of staff, cost containment, resolving staff friction within the Service, appearing at medical staff meeting to educate physicians regarding the need to implement cost containment efforts, and reducing overtime.

10. Q. Were there many complaints during the period of time that you were supervising him in reference to the Pharmacy waiting, period, the cost of Pharmaceuticals and maybe the poor managerial Staff in Pharmacy Service?

A. No, not in excess of the usual type of complaints from some patients who complained about waiting time for picking up prescriptions. I do not believe that there were any serious concerns which I expressed to the Director regarding cost of pharmaceuticals or about M. Perkins' poor managerial style during the time I supervised him.

11. Q. So based upon what you're saying did some of the problems very possible exist before Mr. Perkins and some of them probably existed during the period of time that he was there at Castle Point?

A. Most definitely, yes. Until I left on sabbatical in October 1989, Mr. Perkins was beginning to successfully bring order to a chaotic (physical) situation in the pharmacy because of simultaneous construction and renovation work which was going on in the area.

12. Q. Shall I assume from the statements that you are making that the problems that are alleged were not attributable to Mr. Perkins, per say, but to the system and that these problems existed prior to Mr. Perkins as well as during his time?

A. Most definitely, yes.

13. Q. During your supervision of him, did he work through you to the Resources Committee to request additional Staff in the Pharmacy Service?

A. Yes.

14. Q. During your time, did he have to come in frequently asking for additional monies because of the raging price increases for Pharmaceuticals?

A. No, not in excess of what his predecessors used to do. In fact, if my recollection is correct, Mr. Perkins came in with fewer request for additional funds than his predecessors did.

15. Q. During your period of time was there an audit of the Pharmacy Service where the people came in and rated the Pharmacy Service?

A. Not that I was aware of. When I returned from my sabbatical in April 1990, I may have been told by Mr. Perkins that there was an audit.

16. Q. Are you aware of a site visit?

A. I do have a vague recollection of a "site visit," but I do not recall ever being shown the report of the site visit.

17. Q. This was March 5-7, 1990 when they had a Chief Management Equivocal Information Service where they brought in the Chief of Pharmacy Service from Dayton, Ohio and they did a review of Pharmacy Service.

A. I was on my sabbatical at the Uniformed Services University of Health Sciences, Bethesda, Maryland at that time.

18. Q. So, therefore, you were not aware of the specifics?

A. That is correct.

19. Q. When did you return to duty.

A. First week of April 1990

20. Q. So, you did not really get involved in any of the things that were presented in that audit?

A. That is correct.

21. Q. At that time had the Pharmacy people been converted from Title 5 to Title 38 or did this occur later on?

A. I think (I am not sure) that the conversion was in the process of being accomplished.

22. Q. From your opinion, based upon the things you are saying would you have recommended Mr. Perkins for advancement to GM- 13.

A. Absolutely without equivocation, especially after hearing about the ones at Castle Point VA medical Center who were advanced to GM - 13.

23. Q. Were you also under the same concept about his Assistant Chief of Pharmacy?

A. I was not aware of any special problems between the Chief (Mr. Perkins) and the Assistant Chief - who was the Assistant Chief?

24. Q. Someone by the name of Esperanza J. Baisas.

A. I do not recall any problems

25. Q. Do you have any additional information you can provide me pertaining to this complaint?

A. Yes, I am disappointed that Mr. Perkins had to resort to a grievance procedure to obtain recognition of his contributions to the VA. But then I not surprised. The VA system is known to discard its senior managers with little or no consideration of their prior accomplishments as and when they reach their retirement age.

/s/ Jesse Raymond
Jesse Raymond
EEO Investigator

/s/ C. Alex Alexander
Alex Alexander

Supreme Court, U.S.
FILED
MAY 24 1996

(2)

No. 95-1613

In the Supreme Court of the United States

OCTOBER TERM, 1995

LUTHER C. PERKINS, PETITIONER

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
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10PP

QUESTION PRESENTED

Whether the failure of petitioner's counsel to file petitioner's age discrimination complaint in time provides a basis for equitable tolling of the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 70 F.3d 1252 (Table). The opinion of the district court (Pet. App. A3-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1995. The petition for a writ of certiorari was filed on February 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was hired in July, 1988, by the Veterans Administration (VA) as Chief of Pharmacy at its Medical Center in Castle Point, New York. Pet. App. A6. In February, 1989, the VA reclassified the position of Chief of Pharmacy, which made petitioner eligible for a promotion and pay increase. *Id.* at A21. Petitioner did not receive a promotion, however, and he alleges that the decision not to promote him was based on his age, which was 64 at the time. *Id.* at A8.

On January 24, 1991, petitioner filed an employment discrimination complaint with the VA, alleging that the failure to promote him violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* On February 18, 1993, the VA denied petitioner's claim, finding that there had been no discrimination. On March 18, 1993, petitioner appealed the VA's final decision to the Equal Employment Opportunity Commission (EEOC). The EEOC affirmed the VA's decision on September 21, 1993. Pet. App. A8, A10, A21. Petitioner received notice of the EEOC's decision on September 23, 1993. Pet. 3. Under the ADEA, petitioner was required to file a judicial action within 90 days after receiving notice of the EEOC decision, or by December 22, 1993. See 29 U.S.C. 626(e).

Following the EEOC's decision, petitioner contacted Daniel Cochran, an attorney in East Kingston, New Hampshire. Cochran allegedly assured petitioner that he would file a complaint on petitioner's behalf, but he failed to do so. Pet. App. A11. After petitioner became aware that no complaint had been filed, he filed a *pro se* age discrimination complaint in district court, on July 8, 1994. *Ibid.*

The VA moved to dismiss the case on the ground that the complaint, filed seven and one-half months after the expiration of the limitation period imposed by 29 U.S.C. 626(e), was untimely. The district court dismissed the case and stated that, although petitioner's failure to file a timely claim "resulted solely from the gross error of [petitioner's] attorney," the case did not warrant equitable tolling of the statute of limitations under the "narrow view of the doctrine" expressed in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). Pet. App. A3. The court of appeals affirmed the dismissal, stating that, although it was "not unsympathetic with [petitioner's] plight," under the circumstances petitioner's sole remaining remedy was an action against his attorney. *Id.* at A1-A2.

ARGUMENT

Under the statute of limitations applicable to the ADEA, 29 U.S.C. 626(e), an aggrieved employee must file a judicial action within 90 days after receiving notice of the final decision of the EEOC. Petitioner received notice of the EEOC's final decision denying his administrative claim on or before September 23, 1993. Pet. 3. Accordingly, petitioner's deadline for filing an action under the ADEA was December 22, 1993. Petitioner's complaint was not filed until July 8, 1994. Pet. App. A11.

It is undisputed that petitioner's suit was not timely filed. The only question is whether the failure of petitioner's counsel to file a complaint, after assuring petitioner that he would do so, provides a basis for tolling the limitation period. The lower courts held that equitable tolling would not be proper in this case.

In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), this Court ruled that the statute of limitations in Title VII of the Civil Rights Act of 1964 is subject to equitable tolling. The Court also held, however, that the statute should not be tolled on the facts of *Irwin* itself, in which the employee's counsel did not file a complaint until after the expiration of the limitation period. The Court stated that, although equitable tolling may be appropriate "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing a filing deadline to pass," the Court has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.*

In this case, as in *Irwin*, neither petitioner nor his attorney filed a discrimination complaint within the prescribed period. Although petitioner argues that he should not be penalized for the default of his counsel, "[u]nder our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent." *Irwin*, 498 U.S. at 92. See also *Murray* v. *Carrier*, 477 U.S. 478, 488, 492 (1986); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). A discrimination plaintiff ordinarily cannot avoid the requirement that he actively pursue his remedies and employ due diligence in protecting his legal rights by asserting that his attorney failed to protect his rights. See *Gilbert* v. *HHS*, 51 F.3d 254, 257 (Fed. Cir. 1995); *Edwards* v.

Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).[1]

Petitioner relies (Pet. 6) on cases such as *Carter* v. *City of Memphis*, 636 F.2d 159 (6th Cir. 1980), and *Hassenflu* v. *Pyke*, 491 F.2d 1095 (5th Cir. 1974). The issue in those cases, however, was whether dismissal of a case was the appropriate sanction for counsel's failure to comply with court orders governing discovery and other deadlines.[2] In those cases, the courts of appeals noted that district courts have available a variety of sanctions to punish the failure to abide by court orders, and concluded that the severe sanction of dismissal should be reserved for the most extreme cases. The usual consequence of the failure to file an action within a period prescribed by a statute of limitations, however, is dismissal of the case. Equitable relief from that consequence is to be afforded "only sparingly," and not in "garden variety" cases of neglect. *Irwin*, 498 U.S. at 96. See also *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984).

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[1] Petitioner relies (Pet. 6) on *Volk* v. *Multi-Media, Inc.*, 516 F. Supp. 157 (S.D. Ohio 1981), in which the court concluded that the failure of the plaintiff's counsel to present a discrimination charge within the prescribed time provided a basis for equitable tolling of the statute of limitations. *Id.* at 162. As the district court in this case recognized, however (Pet. App. A3), *Volk* is not consistent with this Court's subsequent formulation of the principles of equitable tolling in *Irwin*.

[2] In *Carter*, the court also noted that, although all attorney misconduct might not support dismissal of a client's action, a complete "failure to prosecute" would do so. 636 F.2d at 161.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MARK C. NILES
Attorneys

MAY 1996